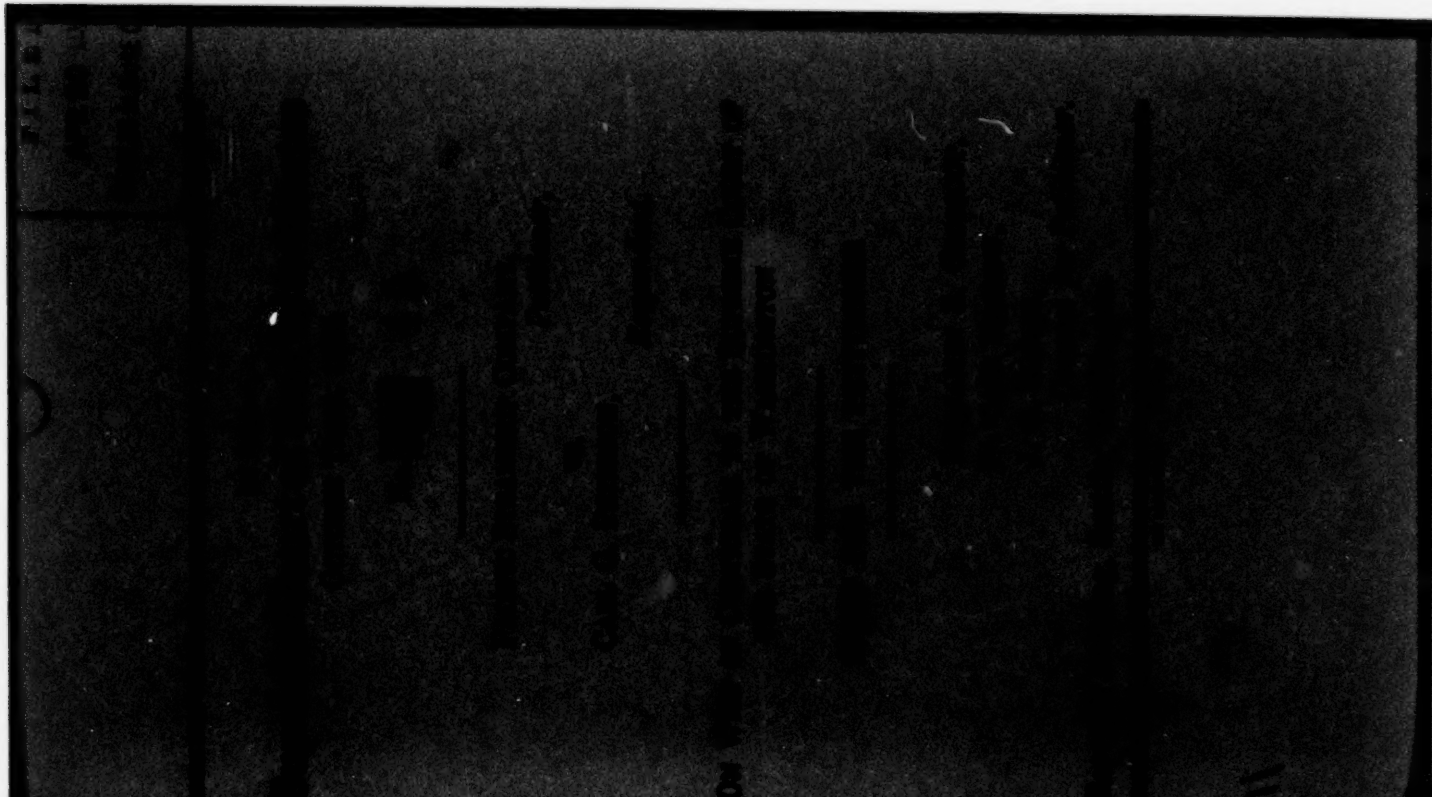

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927

No. 707

PACIFIC STEAMSHIP COMPANY,
Petitioner,

vs.

CARL G. PETERSON,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE PETITIONER

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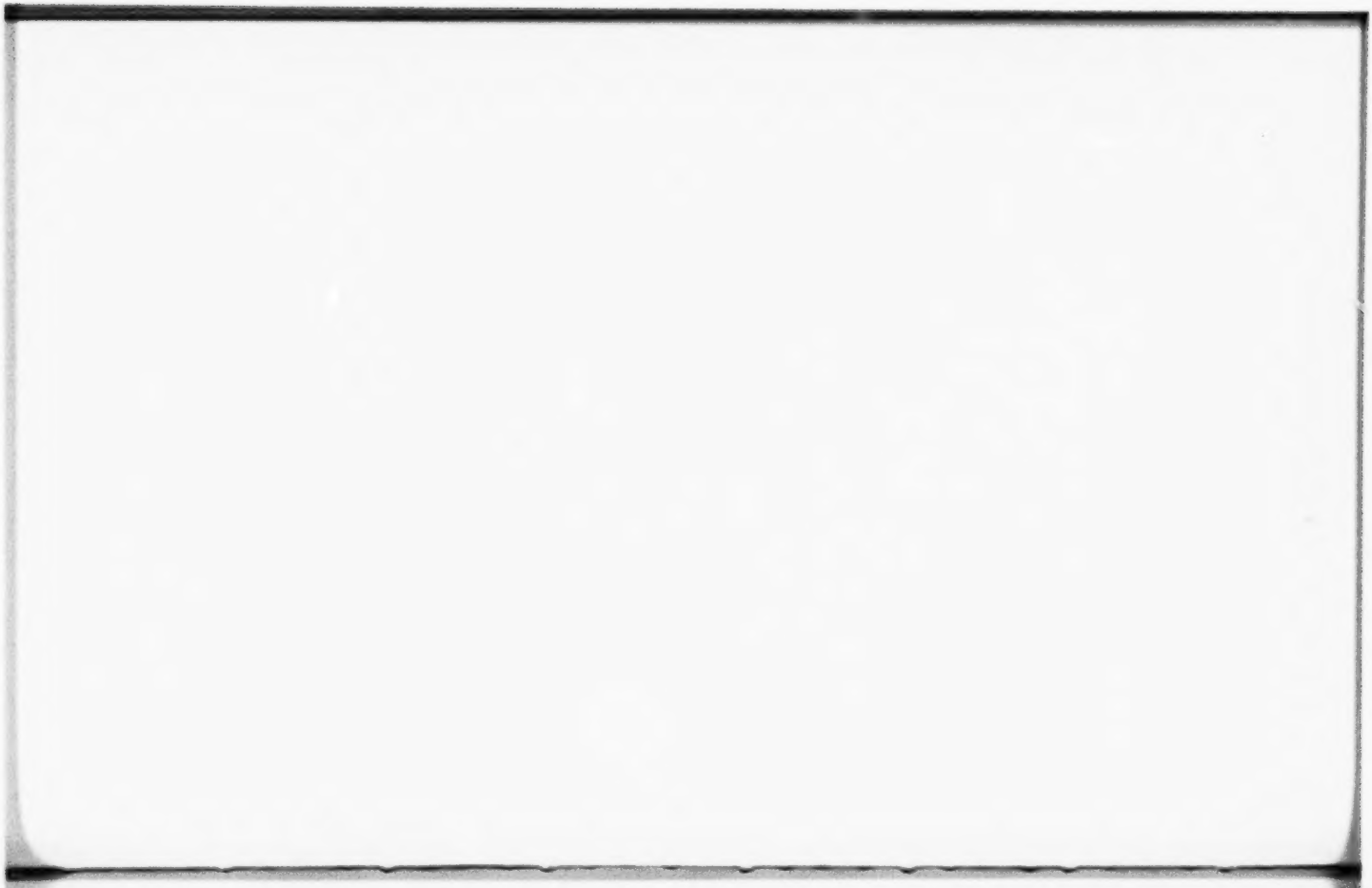

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OPINION

The opinion of the Supreme Court of the State of Washington (R. 34) is reported in 261 Pac. Rep. 115.

JURISDICTION

The opinion of the Supreme Court of the State of Washington was rendered on November 3, 1927 (R. 34). The petition for rehearing was overruled on December 8, 1927 (R. 54). Final judgment in the Supreme Court of the State of Washington was rendered on December 8, 1927 (R. 55). Order stay-

ing proceedings on judgment pending petition for certiorari was entered on December 8, 1927 (R. 55). The petition for writ of certiorari was filed in this court on January 18, 1928, and was granted by this court on March 5, 1928.

SPECIFIC CLAIM ADVANCED

Respondent brought this action under Sec. 33 of the Merchant Marine Act 41 Stat. 1007, now Sec. 688 Title 46 U. S. C. (R. 1). Petitioner by way of affirmative allegations and affirmative defenses (R. 4, Par. 2, R. 6 Par. 3, R. 12 Par. 3) alleged that the respondent, prior to the bringing of the present action had demanded of the petitioner and received maintenance and cure for his injuries and wages to the end of the voyage on which he was injured and that he had elected prior to the bringing of his action to receive compensation for his injuries under the general maritime law and had received the same, and that after receiving the same he could not maintain an action under said Section 33 of the Merchant Marine Act.

The Supreme Court of the State of Washington held that respondent's affirmative allegations and affirmative defenses did not constitute an election to take under the general admiralty or maritime law and constituted no bar to respondent's action for common law damages under said Section 33 of the Merchant Marine Act.

Determination of this question requires an interp-

retation and construction of said Section 33 of the Merchant Marine Act and particularly the words "at his election" found therein, and gives this Court jurisdiction to review the judgment of the Supreme Court of the State of Washington by certiorari under Section 237 B of the Judicial Code as amended by act of Congress February 13, 1925, now Section 344 B. Title 28 U. S. C.

STATEMENT OF THE CASE

The respondent commenced this action on June 3, 1926, in the Superior Court of King County, Washington. He seeks to recover damages for personal injuries received during the course of his employment with petitioner as a seaman. He brought his action under Section 33 of the Merchant Marine Act (R. 1). Paragraph II of his complaint (R. 1) reads as follows:

> "That the plaintiff prosecutes this action under and by the terms and provisions of Section 20 of the Act of Congress of March 4, 1915, as amended by section 33 of the Act of June 5, 1920, known as the 'Jones Act'."

His action is based upon the negligence of a fellow servant. The charging part of his complaint found in Paragraph V (R. 2) reads as follows:

> "That nevertheless the mate negligently ordered the plaintiff to lash the said cargo and the said officer in command of the said vessel negli-

gently and carelessly failed and omitted to have the vessel hove to or slowed down, during the said work, to prevent the sea breaking over the decks and carelessly and negligently failed to install and provide a life line on the after port quarter."

No contention or claim is made by respondent in his complaint, or otherwise, that his injuries were due in any way to the unseaworthiness of the vessel or defective equipment.

Petitioner filed its answer to said complaint (R. 3) which answer consists of general and special denials, affirmative allegations and affirmative defenses. Petitioner's answer to Paragraph II of respondent's complaint above quoted, is as follows:

"Denies each and every allegation, and all allegations contained in Paragraph II of plaintiff's complaint, and in this connection alleges that long prior to the commencement of plaintiff's action set out in his said complaint, the plaintiff elected to receive wages to the end of the voyage, and maintenance and cure for any injuries which he received on said voyage; and the plaintiff has received his wages to the end of the voyage and has received maintenance and cure for any injury received, and received the same prior to the filing of his said complaint herein, and he cannot now maintain an action under the Jones Act, or any other act, for damages for any injuries received upon the voyage set out in his complaint." (R. 4)

Petitioner also set up an affirmative defense to re-

spondent's complaint, Paragraph III of which (R. 6 and 7) reads as follows:

> "That while the said S. S. "Admiral Dewey" was on a voyage between the ports of Puget Sound and ports of California, it had laden on board a cargo of boxed clams and oysters lashed on the after port deck. That on or about the 20th day of December, 1924, while on said voyage, the said vessel encountered a heavy sea which caused the said cargo to be and become awash. That the plaintiff attempted to lash the said cargo, and while so engaged a sea broke over the aft port deck of said vessel and caused a box of said cargo to strike plaintiff, and injured his left knee. That immediately thereafter plaintiff's leg was placed in splints by the mate and as soon as said vessel arrived at the Port of San Francisco, California, plaintiff was by the defendant removed from said steamship and conveyed to the Marine Hospital at San Francisco, for maintenance and cure. That plaintiff has received from the defendant at said hospital maintenance and cure as far as medical and surgical attention can reasonably effect a cure. That the plaintiff received his wages from the defendant to the end of the voyage, including a bonus totaling the sum of $41.10, prior to the commencement of this suit. That the plaintiff in accepting said wages to the end of the voyage and in permitting defendant to take him to said Marine Hospital at San Francisco, California, and in consenting to go thereto

for maintenance and cure for the injuries he received, elected to take compensation for said injury under the general admiralty and maritime law in such cases made and provided, and he has been fully and completely compensated by defendant for said injuries under the said general admiralty and maritime law, and the plaintiff made said election to accept compensation and received the same under the general admiralty and maritime law long prior to the filing of this suit and the plaintiff cannot now elect to sue or maintain this action, for damages under section 20 of the act of Congress of March 4, 1915, as amended by section 33 of the Act of June 5th, 1920, known as the Jones Act."

Petitioner prayed in its answer for judgment dismissing plaintiff's cause of action. Respondent thereafter filed a motion to strike all of petitioner's affirmative allegations to Paragraph II of respondent's complaint (R. 7) and also filed a demurrer to the affirmative defense in petitioner's answer on the ground that the facts set out therein did not constitute a defense to respondent's action (R. 8). The motion to strike was granted, and the demurrer was sustained (R. 8). Petitioner thereupon filed an amended answer setting forth in greater detail the affirmative defense contained in its original answer above quoted and adding thereto the following allegation:

"That at the beginning of said voyage and at all times during the continuation of the same the said steamship 'Admiral Dewey' was properly equipped, manned, victualled and in all respects seaworthy." (R. 12)

Respondent moved to strike from the files the petitioner's said amended answer (R. 13) which motion was granted by the court (R. 14).

The trial court by its rulings above specified held that where a seaman has received personal injury in the course of his employment and has demanded and received maintenance and cure for said injuries, as far as medical and surgical skill can effect a cure, and has demanded and received wages to the end of the voyage on which he was engaged at the time of his injury, he does not thereby elect to receive compensation for his injuries under general admiralty or maritime law and is not estopped thereby from thereafter maintaining an action for the same injuries under Section 33 of the Merchant Marine Act and recovering full common law damages for the same.

This action came regularly on for trial on the respondent's complaint and the special and general denials contained in petitioner's original answer. As a result of the trial, a judgment was entered in favor of respondent and against petitioner by the trial court in the sum of $12,500 and costs of suit (R. 30).

Petitioner thereafter appealed from said judgment to the Supreme Court of the State of Washington (R. 31), and filed its supersedeas and cost bond on said appeal in the sum of $25,500 (R. 32). The petitioner in its assignment of errors in the Supreme Court specified and complained against the ruling of the trial court above set forth (R. 32).

This cause was heard before Department 2 of the Supreme Court of the State of Washington, which

court rendered its decision November 3, 1927, holding that the rulings of the trial court above specified were not error, and affirming the judgment (R. 34). In due course the Petitioner filed in said court its petition for rehearing before the full court (R. 47), which petition was denied on December 8, 1927 (R. 54). Final judgment of the Supreme Court of the State of Washington in this cause affirming the judgment of the court below was entered on December 8, 1927 (R. 55). On December 8th, 1927, an order was entered by the Supreme Court of the State of Washington staying proceedings on the judgment pending petition to this court for writ of certiorari (R. 55). Certiorari was granted by this Court on March 5, 1928.

SPECIFICATIONS OF ERROR TO BE URGED

The courts below erred in failing to sustain the petitioner's plea of election and satisfaction and in holding that a seaman who has received an injury in the course of his employment and has demanded and received maintenance and cure for his said injuries and wages to the end of the voyage on which he was injured, does not thereby elect to seek compensation under the general maritime law and is not estopped from thereafter suing for and recovering full common law damages for the same injury.

SUMMARY OF ARGUMENT

It was not the intention of the Congress of the United States in the enactment of Section 33 of the Merchant Marine Act to abolish, change or modify the general admiralty or maritime law governing the relation of a seaman to his ship and his employer, as developed by the admiralty courts and called by this Court, the old rules. It was clearly the intention of congress in the enactment of said Section 33 of the Merchant Marine Act to bring into the maritime law, new rules drawn from a different system. By the enactment of that section congress picked up bodily the common law as modified by the Federal Employer's Liability Act and incorporated the same into the maritime law and made it an equal and coordinate part of the maritime law governing the relation of a seaman to his ship and his employer.

It was the intention of congress that these two diverse and different systems of law should remain separate and distinct yet side by side as part of the maritime law with a right in the seaman to elect under which he would seek compensation for any injuries received in the course of his employment. This intention of congress is made clear by the history of the maritime law, by the nature of the relation existing between the seaman and his employer, and by the language used in the enactment of said Section 33. This Court, prior to the decision of the Supreme Court of the State of Washington, had so construed this statute. The respondent, prior to bringing this action

for the injury which he received in the course of his employment, had demanded and received from petitioner maintenance and cure for sixteen months and had demanded and received his wages to the end of the voyage on which he was injured. The respondent by so demanding his maintenance and cure and wages elected to take compensation for his injuries under the old rules. These facts were specially pleaded by petitioner in its answer and they constitute a complete bar to plaintiff's cause of action. The Supreme Court of the State of Washington in holding such facts constituted no defense to plaintiff's cause of action committed manifest error.

ARGUMENT

The one question, presented in this proceeding by the petitioner, is whether or not a seaman who has received a personal injury in the course of his employment, who has for said injury, demanded and received from his employer maintenance and cure, as far as medical and surgical skill can effect a cure, and who has demanded and received from his employer wages to the end of the voyage, can thereafter maintain an action against his employer and recover therein full common law damages for the same injury under Section 33 of the Merchant Marine Act.

I

Intention of Congress in Enacting Section 33 of the Merchant Marine Act.

The answer to this question requires a construction and an interpretation of Section 33 of the Merchant Marine Act, 41 Stat. 1007, now Section 688 Title 46 U. S. C. The material part of said section reads as follows:

> "That any seaman who shall suffer personal injury in the course of his employment may *at his election* maintain an action for damages at law, with the right of trial by jury, and in such

action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply."

The important question to be determined is what was the intention of the Congress of the United States in the enactment of this statute. A careful, thorough, and accurate historical review of the development of the law governing the relation of a seaman to his employer is to be found in the great case of

The Osceola, 189 U. S. 158.

It is sufficient for present purposes to call attention to the fact that the nature of the employment and relation existing between a seaman and his employer was vastly different from that existing between master and servant on land. The seaman could not quit his employment after the voyage had once begun. He was taken far from his home and among strangers. He was often required to expose himself to the greatest dangers and perils of the sea for the safety of the ship, its cargo, passengers, and other members of the crew. It was most natural therefore that the law governing the relation between a seaman and his ship and his employer should differ markedly from that governing the ordinary relation between master and servant, and the admiralty courts developed an entirely different set of rules governing this relation as compared with those developed by the common law courts.

The rules of law developed by the admiralty courts governing the relation of a seaman to his employer have always been considered more benign, just, and

humane than the rules developed by common law courts governing the relation of master and servant. The legislatures of the various states of the Union, in passing what is known as Workmen's Compensation Acts, have patterned them to a large extent upon the principles of law developed by the admiralty courts governing the relation of a seaman to his employer, in this, that they make definite and certain that the wounded servant will receive maintenance and medical attention and at least a certain portion of his wages during the time of disability.

It will not be presumed that congress intended when it enacted Section 33 of the Merchant Marine Act to take away from a seaman his absolute right to maintenance and cure when sick or wounded. The nature of a seaman's employment is such that it would be abhorrent to humanitarian principles to deprive him of this right and the court will certainly not construe this statute so as to deprive the seaman of this right unless forced to do so by the clearest and most positive terms of the statute. The plain language of the statute shows clearly that it was not the intention of congress to change or modify or abolish those great humanitarian rules developed by the admiralty courts.

Congress enacted that the injured seaman "may *at his election* maintain an action for damages." The principle of law is too well settled to require the citation of authorities that in construing a statute all the words used therein by the legislature must be given their common ordinary meaning, force and effect, if possible to do so. What did congress mean when it used the words "at his election" found in the statute?

The words "at his election" are in frequent use and their meaning has been defined by the courts so frequently that there can now be no dispute as to their correct interpretation. It certainly must be presumed that congress knew the meaning of those words when it passed the statute and intended to give them their well defined effect. Generally speaking, the words in substance and effect mean that a person who has a right of election must select one out of several. He cannot have both, or part of one and part of the other.

> "Election is simply what its name imports; a choice, shown by an overt act, between two inconsistent rights, either of which may be asserted at the will of the chooser alone."
>
> *Wm. W. Bierce v. Hutchins*, 205 U. S. 340, 346;
>
> 3 Words and Phrases, pp. 2336-2337;
>
> 2 Words and Phrases (2d. Ser.) p. 233.

If congress in the enactment of Section 33 of the Merchant Marine Act in using the words "at his election" intended to give a seaman a right to elect between the relief granted by this act and some other relief, it must be some other relief which was existing at the time the statute was enacted, and the only relief which the injured seaman had at the time the statute was enacted was the relief accorded by the old rules of the admiralty courts and laid down in the case of *The Osceola*, *supra*, p. 175, as follows:

> "1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his mainten-

ance and cure, and to his wages, at least so long as the voyage is continued.

2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seaman in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. *Scarff v. Metcalf*, 107 N. Y. 211.

3. That all members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.

4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

It is manifest that congress in the enactment of Section 33 did not intend to abolish the old rules, for if the old rules were abolished there would be nothing left between which the injured seaman might elect. No language can be found in the statute showing an intention on the part of congress to change or modify the old rules. Nor is there anything strange or strained in this interpretation of the act. There are many instances in the law where wronged persons have a right to elect not only between remedies, but between substantive laws as a means of redress, as was pointed

out by this Court in the case of *Panama Railway Company v. Johnson*, 264 U. S. 375.

At the time this statute was enacted there were many instances where under the laws of this country an injured servant was given a right of election between two diverse substantive laws to measure his redress. For example, many of the Workingmen's Compensation Acts adopted by the various states of the Union are the same as the Iowa law, which this Court determined in *Chicago R. I. & P. Ry. v. Schendel*, 270 U. S. 611-613, was elective in form.

The history of the maritime law, the surrounding circumstances, the nature of the employment, and the language of the statute all point to the fact that it was not the intention of congress in the enactment of this law to abolish, change or modify the old rules, but on the contrary to allow the old rules to stand unchanged and merely to bring into the maritime law, new rules and give a seaman a right to elect under which of the two he chose to measure his compensation for an injury received.

II

Decisions of the Supreme and Inferior Federal Courts Construing the Statute.

The decision of the Supreme Court of the State of Washington in this case is not only out of harmony with the plain language of the statute, but is also contrary to the construction placed upon the statute by

this Court and the inferior Federal courts. This Court has had several occasions to construe this statute.

The constitutionality of this statute was involved in the case of

Panama Railway Company v. Johnson, 264 U. S. 375.

Among the various constitutional questions raised in that case is the following:

> "The Act is in conflict with the Fifth Amendment. The arbitrary and irrational discrimination carried by this law is apparent upon its face. If a privilege is to be given the plaintiff to try his cause of action under either one of two diverse systems of law, where not only the remedies but the rights are different, no sound reasoning can be advanced why a similar privilege should not be extended to the defendant." (p. 380)

In answering this contention of the employer this Court said:

> "A further objection urged against the statute is that it conflicts with the due process of law clause of the Fifth Amendment in that it permits injured seamen to elect between varying measures of redress and between different forms of action without according a corresponding right to their employers, and therefore is unreasonably discriminatory and purely arbitrary. The complaint is not directed against either measure of redress or either form of action, but only against the right of election as given. Of course the objection must fail. There are many instances in the

law where a person entitled to sue may choose between alternative measures of redress and modes of enforcement; and this has been true since before the Constitution. But it never has been held, nor thought so far as we are advised, that to permit such a choice between alternatives otherwise admissible is a violation of due process of law. In the nature of things, the right to choose cannot be accorded to both parties, and if, accorded to either, should rest with the one seeking redress rather than the one from whom redress is sought." (p. 392)

This Court held this statute constitutional against the above objection, not because there was no election between two diverse systems of law, but in spite of that fact, and this more clearly appears when other language used by this Court in the same case in answering other constitutional objections to the act is considered. The language is as follows:

"Rightly understood, the statute neither withdraws injuries to seamen from the reach and operation of the maritime law nor enables the seaman to do so. On the contrary, it brings into that law new rules drawn from another system *and extends to injured seamen a right to invoke at their election, either the relief accorded by the old rules or that provided by the new rules. The election is between alternatives accorded by the maritime law as modified*, and not between the law and some non-maritime system. * * * So we think the reference is to all actions brought to

recover compensatory damages under the new rules as distinguished from the allowance covered by the old rules, usually consisting of wages and the expense of maintenance and cure." (p. 388)

In the case of *Engel v. Davenport*, 271 U. S. 33, the plaintiff, a seaman, brought an action for personal injuries received in the course of his employment with the defendant. The sole question before this Court was whether or not by his action he had elected to seek compensation for his injuries under the old rules or under the new. This Court in deciding that question said on page 35:

"It is settled by the decision in *Panama Railroad v. Johnson*, 264 U. S. 375, that §33 of the Merchant Marine Act is an exercise of the power of Congress to alter or supplement the maritime law by changes that are country wide, and uniform in operation; that it brings into the maritime law new rules drawn from Employer's Liability Act, and its amendments—adopted by the generic references to "all statutes of the United States modifying or extending the common law right or remedy in cases of personal injuries to railway employees"—and "extends to injured seaman a right to invoke at their election, either the relief accorded by the old rules or that provided by the new rules"; that is, that it grants them, as an alternative, the common law remedy of an action "to recover compensatory damages under the new rules as distinguished from the allowances covered by the old rules" which, as a modi-

fication of the maritime law, may be enforced through appropriate proceedings *in personam* on the common-law side of the courts.

1. The present suit is not brought merely to enforce the liability of the owner of the vessel to indemnify for injuries caused by a defective appliance without regard to negligence for which an action at law could have been maintained prior to the Merchant Marine Act, *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255; and we need not determine whether if it had been thus brought under the old rules, the state statute of limitations would have been applicable. See *Western Fuel Co. v. Garcia*, 257 U. S. 233. Here the complaint contains an affirmative averment of negligence in respect to the appliance. And, having been brought after the passage of the Merchant Marine Act, *we think the suit is to be regarded as one founded on that Act, in which the petitioner, instead of invoking as he might, the relief accorded him by the old maritime rules, has elected to seek that provided by the new rules* in an action at law based upon negligence—in which he not only assumes the burden of proving negligence but also, under §3 of the Employer's Liability Act, subjects himself to a reduction of the damages in proportion to any contributory negligence on his part. This conclusion is in harmony with the *Panama Railroad* case, pp. 382, 383, in which the complaint charged that the injuries resulted from negligence in providing a defective appliance and in other respects."

In *Baltimore S. S. Co. v. Phillips*, 47 Sup. Ct. Rep. 600, this Court held that it was error to allow any seaman maintenance and cure in an action brought to recover damages for personal injuries under Section 33 of the Merchant Marine Act. This Court held that in an action brought under the Merchant Marine Act the rules announced in *The Osceola* case were not operative and thereby again reaffirmed the principles which it had theretofore announced that the right of an injured seaman to recover under the old rules or the new were separate and distinct rights and could not be commingled and that his full right of recovery would be measured by either the one or the other, depending upon which he elected.

The inferior Federal Courts have always, as far as petitioner has been able to ascertain, uniformly held that congress by the enactment of Section 33 of the Merchant Marine Act did not change, modify or repeal in any way the old rules; that congress merely brought into maritime law new rules and an injured seaman might elect and must elect under which he will seek compensation for his injuries; that he could not have compensation under both or part of one and part of the other; and that a seaman's right under the old rules and the new were separate and distinct and could not be commingled.

Kuhlman v. W. A. Fletcher Co., 20 Fed. (2d) 465;
Lorang v. Alaska S. S. Co., 298 Fed. 547;
Wagstaff v. United States, 281 Fed. 877;
Hughes v. Alaska S. S. Co., 287 Fed. 427;
Phillips v. Baltimore S. S. Co., 295 Fed. 323;
Rosinski v. Conners, 21 Fed. (2d) 591;

In the case of *Kuhlman v. W. A. Fletcher Co., supra*, plaintiff brought an action on the common law side of the Federal District Court, based upon negligence; he afterwards sought by motion and amendment to the complaint to transfer his action to the admiralty side of the court and to recover for the same injuries under the old rules. The trial court refused to allow the amendment to the complaint and refused to transfer the case from the common law side of the court to the admiralty side. After judgment, the plaintiff appealed to the Circuit Court of Appeals for the Third Circuit and alleged error on the part of the trial court in its said ruling. The circuit court of appeals, in deciding this question was required to interpret Section 33 of the Merchant Marine Act, and in construing this section said (p. 467):

> "This section broadened the maritime law by giving a seaman a new right—a right at law—through proceedings *in personam*, according to the course of the common law, on the common-law side of Federal district courts. State courts also have like jurisdiction. *Engel v. Davenport*, 271 U. S. 33; 46 S. Ct. 410; 70 L. Ed. 813. By so doing the Congress did not abrogage his old action in Admiralty, but gave him an entirely new action and allowed him a clear option to assert his old action in Admiralty on the Admiralty side of the District court with trial to the court or to assert his new action, based on

negligence, on the law side with right of trial by jury. *Panama R. R. v. Johnson*, 264 U. S. 375; 44 S. Ct. 391; 68 L. Ed. 748; *Engel v. Davenport*, 271 U. S. 33, 36, 46 S. Ct., 410; 70 L. Ed., 813. If he elect the latter, he foregoes the advantages which the Government extends to seamen as its wards and places himself in the same relation to his employer as a railway employee engaged in interstate commerce bears to his employer, with different yet certain advantages and certain disadvantages. *Engel v. Davenport*, 271 U. S. 33, 36, 46 S. Ct., 410; 70 L. Ed., 813. These old and new rights may not be commingled but must be asserted separately in the forum which has jurisdiction of them respectively. *The West Jester* (D. C.), 281 F. 877, 878."

The petitioner respectively submits that this court and the inferior Federal courts in the above cited cases have firmly established the following propositions of law:

1. That the maritime law at the time of the injury to respondent afforded to an injured seaman two separate and distinct grounds of relief or causes of action, one to recover the allowances provided by the old rules, the other to recover the damages provided by the new.

2. That he may pursue either at his election.

3. That he must elect under which he will seek compensation.

4. That he cannot recover under both the old and new, or a part of one and a part of the other.

III.

Did the Respondent Elect to Take Under the Old Rules Prior to Bringing the Present Action Under the New Rules?

Petitioner in its answer (R. 3) and amended answer (R. 9) to the respondent's complaint by way of affirmative allegations and affirmative defenses alleged that the respondent immediately after the injury was given such treatment and care as the ship was able to provide and that upon the ship's arrival at the Port of San Francisco the respondent, with his consent, was immediately taken by the petitioner to the Marine Hospital for maintenance and cure. That he was maintained at the Marine Hospital by the petitioner for a period of about sixteen months and he left the Marine Hospital voluntarily and was cured at the time he left as far as medical and surgical skill could reasonably effect a cure. That while at said hospital the petitioner, at respondent's request and demand, paid him his wages to the end of the voyage which consisted of about two weeks' wages amounting in all to the sum of $41.10. The respondent was receiving wages at the time in the sum of $80.00 per month and he was injured about two days after the voyage started. Respondent at the time of the injury was a boatswain (R. 2 Par. 3). It was further alleged by the petitioner that the ship on which the respondent was injured was at the time of the injury properly equipped, manned, victualled and in all respects seaworthy (R. 12 Par. 3). That respondent at his request received from the

petitioner such maintenance and cure and wages prior to the commencement of the present action and by so doing he voluntarily elected to take compensation for his injuries under the general admiralty and maritime law and he had been fully and completely compensated by the respondent for said injuries under said general admiralty and maritime law, that he made said election for said compensation and received the same under the general admiralty and maritime law prior to the filing of this suit.

None of these allegations are denied and all of them must be accepted as true. The Supreme Court of the State of Washington found these allegations to be true as a matter of fact. The Supreme Court found:

> "At the time of the injury respondent was thirty-six years of age and had followed the sea 21 years prior to the injury." (R. 37)
>
> "Under all the decisions he was entitled to wages and maintenance at least to the end of the voyage and cure if possible. That was accorded him by paying him the small amount of wages due to the end of the voyage and taking him for care and treatment to the United States Marine Hospital. He did not reject the treatment and care at the hospital, but accepted it so long as it seemed necessary and proper." (R. 41)

Under these allegations and facts it clearly appears that the respondent prior to the bringing of the present action not only demanded but received from the petitioner all of the compensation to which he was entitled under the old rules, and it has not

been denied so far and cannot be successfully denied, that under such facts, respondent elected to take compensation under the old rules if under the law he is required to elect or can elect under which set of rules he would receive compensation for his injuries.

This court in the case of *Robb v. Vos*, 155 U. S. 13-43, held:

> "The rule established by these cases is that any decisive act by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and that one of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action based upon such an act."
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> *Wall v. Parrott Silver & Copper Co.*, 244 U. S. 407;
>
> *Engel v. Davenport*, 271 U. S. 33;
>
> *Kuhlman v. W. A. Fletcher Co.*, 20 Fed. (2d) 465.

The substance of the holding in these cases is that any decisive act by a party who has an election, constitutes such election and particularly the bringing of an action. The acts of the respondent in this case, as alleged by the petitioner and found to be true by the Supreme Court of the State of Washington, in substance not only amount to the bringing of an action under the old rules but the prosecution of such an action to final judgment and also the receipt of payment and the satisfaction of such judgment. He certainly cannot now be heard to say that he did not elect to receive compensation under the old rules. A complete settlement and satisfaction out of court

is as much a bar to a subsequent action on the same controversy as is a prior judgment.

12 Corpus Juris 336.

The petitioner in maintaining the respondent and providing him with maintenance and cure at the Marine Hospital at San Francisco, performed its full duty to respondent to the same extent as though it had provided him with maintenance and cure at a private hospital.

The Santa Barbara, 263 Fed. 369;
The Bouker, No. 2, 241 Fed. 831;
The Balsa, 10 Fed. (2d) 408.

The penalty attached to a ship and its owner for neglecting or refusing to provide a wounded seaman with maintenance and cure, or for failure to pay wages when demanded, if due, is so great and severe (*The Iroquois*, 194 U. S. 240; Section 596, Title 46 U. S. C.) that fair dealing and simple justice requires that a court should not hesitate to hold that a seaman who has received or demanded maintenance and cure for an injury or wages to the end of the voyage has elected to take compensation under the rules providing for such maintenance and cure and wages after injury.

IV.

The Decision of the Supreme Court of the State of Washington.

The history of the maritime law, the plain language of the statute, the construction placed upon this

statute by this court and the inferior Federal courts, seems to the petitioner to so firmly and conclusively establish and uphold the position taken in this case that it does not seem necessary or advisable to discuss in detail the decision of the Supreme Court of the State of Washington. That court summed up its decision in the following language (R. 46):

> "Surely the injured seaman should not be held to have elected his remedy by accepting so positive a matter-of-course duty on the part of the shipowner toward him as wages, maintenance and cure, which he is entitled to receive under any and all circumstances except for misconduct. It does not appear that the amendment of 1920 was intended to restrict in any way the seaman's rights as they previously existed, and, as has been shown, it was well settled before the adoption of the amendment by congress that the seaman was not required to elect between a claim for indemnity and a claim for maintenance and cure, but might in one action demand and recover both."

It appears clear from this quotation that the State Court held that Congress by enacting Section 33 of the Merchant Marine Act did not abolish, change, modify or alter the old rules, but that they are still in full force and effect. That a seaman is now entitled to all of the compensation provided by the old rules and that it is also the absolute duty of the shipowner to provide seamen the compensation provided by the old rules. That by accepting all of the

compensation provided by the old rules the seaman does not elect to take compensation under the old and is not estopped from recovering full common law damages under the new. The old rules were designed to and did furnish full and complete compensation for an injury. The new rules are designed to and do furnish full and complete compensation for an injury. It therefore necessarily follows that if a seaman can recover under both, the shipowner is compelled to pay double compensation to an injured seaman.

Such construction placed upon the statute renders it most unusual. We know of no instance under either the American or English system of law where an injured party has been allowed to recover double compensation for the same injury, and such an intention can hardly be attributed to the Congress of the United States in enacting this statute.

If a statute requiring a defendant to pay in addition to damages sustained the sum of $10.00 for attorney's fees renders the statute unconstitutional, as was decided by this court in the case of

Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U. S. 150,

it hardly seems necessary to contend that the construction placed upon this statute by the Supreme Court of the State of Washington, which requires a ship owner to pay full and complete compensation under both the old rules and the new, would render this statute unconstitutional. Such a construction is to be avoided.

> "But as this Court often has held 'a statute must be construed if fairly possible so as to avoid

not only the question of its unconstitutionality, but also doubts on that score.' "

Panama Railway Co. v. Johnson, supra, p. 390.

The Supreme Court of the State of Washington seems to have arrived at its most remarkable construction of this statute upon the theory that under the old rules a seaman was allowed to bring successive actions until he had recovered all of the compensation allowed by said rules. It seems to be established by the inferior Federal courts that an injured seaman may seek all of the compensation due him under the old rules in one suit or in several.

So far as petitioner is informed this Court has never passed upon the question of whether or not a seaman may bring more than one action under the old rules to recover his full compensation for an injury received. Such a rule however clearly violates the general and well established principle of law against the splitting of a cause of action and does not seem to be in harmony with the recent decision of this Court in the case of *Baltimore S. S. Co. v. Phillips*, 47 Sup. Ct. Rep. 600.

Granting however that a seaman may bring successive suits to recover full compensation provided by the old rules, that fact does not even to the slighest extent support the proposition that a seaman may, after demanding and receiving full compensation under the old rules, or after having elected to take compensation under the old rules, again demand and receive full compensation for the same injury under the new, or maintain suit to recover full compensation

under the new rules. If he may or must elect under which rules he will receive his compensation, then when he has once made his election, under all the authorities, he is bound thereby and must seek his compensation under the rules which he selects and his full compensation must be measured by the selected rules alone, otherwise there is no election. The only effect that the rule that a seaman may bring successive actions under the old rules could possibly have in this case is that if wages, maintenance and cure is not all of the relief which respondent is entitled in fact to receive, he may pursue the petitioner further and still recover any additional relief to which he is entitled under the old rules.

The decision of the Supreme Court of the State of Washington, in effect, strikes from the statute the words "at his election" found therein and substitutes in place thereof the following words: "After having received full compensation for such injury under the general maritime law as it now exists."

With all due deference and respect to the Supreme Court of the State of Washington, its decision in this case seems to the petitioner to evince an over eager desire to legislate rather than to interpret legislation, and also an unseemly reluctance to tread the path well defined by this court.

V

The Contention of Respondent.

Respondent has at all times contended that the words "at his election" found in the statute mean an

election to prosecute the rights given by the new rules in an action at law or by libel in admiralty. This contention of the respondent cannot be sustained.

In the first place it is based upon the assumption that the enactment of Section 33 of the Merchant Marine Act, abolished the old rules. As we have heretofore seen, this cannot be true, and in addition to what has heretofore been said, a hasty review of the reports discloses the fact that seaman since the passage of Section 33 of the Merchant Marine Act have been, and now are, relying upon the old rules as a means of redress much more frequently than they have upon the new.

The case of the "*Quinnipiac*," *William Nahmen v. U. S.*, 1926 A. M. C. 1150, is one of the many illustrative cases that might be cited and no court has held, so far as petitioner has been able to discover, that the old rules are no longer in force and effect.

In the second place this contention of the defendant ignores one of the cardinal principles of statutory construction in that it fails to give any force or effect to the words "at his election" found in the statute, for the reason that prior to the adoption of the statute, an injured seaman had the right to elect between a common law action and a libel in admiralty under Sections 24, Paragraph 3, and 256, Paragraph 3 of the Judicial Code, and would have had that right had the words "at his election" been omitted from the statute.

Panama Railway Co. v. Johnson, supra.

In the third place, such a contention wholly ignores the plain language of this Court in the cases above cited, to the effect that the words "at his election" in

the statute mean an election between the old rules and the new.

CONCLUSION

The petitioner submits that its plea of election and payment under the old rules is a good and valid plea and a bar to the prosecution of any action for the same injury under the new rules and that since the Supreme Court of the State of Washington has found the facts set out in petitioner's said plea are true, the judgment in this case must be reversed and should be sent back with instructions to the lower court to dismiss this action.

Respectfully submitted,

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